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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/587,201	05/15/2007	Jean-Pierre Sachetto	SACH3001/ESS	8441
23364 7590 12/16/2009 BACON & THOMAS, PLLC 625 SLATERS LANE FOURTH FLOOR ALEXANDRIA, VA 22314-1176				
EXAMINER				
HUGHES, ALICIA R				
ART UNIT		PAPER NUMBER		
1614				
MAIL DATE		DELIVERY MODE		
12/16/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/587,201

Applicant(s)

SACHETTO ET AL.

Examiner

ALICIA R. HUGHES

Art Unit

1614

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 10 November 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 10 September 2009. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-10, 13-22 and 35-37.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Ardin Marschel/
Supervisory Patent Examiner, Art Unit 1614

Continuation of 11, does NOT place the application in condition for allowance because:

Firstly, Applicant has amended claims, particularly claims 35 and 36. In both claims 35 and 36, Applicant has replaced the word "calculating" with the word "measuring." This amendment changes the scope of the claims in a manner that would require an additional search, which is improper at the time in the cases's prosecution. Clearly, "calculating" requires a computation of data whereas "measuring" instead requires an additional action step/performance of a task that can be recorded as data and then used as part of a basis for calculating or computing.

Secondly, Applicants rely on the reasons set forth in their Remarks of 18 May 2008. Since that time, particularly on 10 June 2009, the Office has responded affirming its position that Claims 1-10, 13-22, and 35-37 are rejected under 35 U.S.C. §103(a) as being obvious over U.S. Patent No. 5,502,077 [hereinafter referred to as "Breivik et al"] (the reference is being considered in its totality) in view of Borkan et al.

As noted prior, with regard to Borkan, even with the claim amendments, it teaches the same thing: that gelatin may be of Type A, Type B or a mixture thereof. Simply stated, therefore, Borkan teaches Type A gelatin. The mere statement that Borkan evidences the unexpected nature and nonobviousness of the claimed invention cannot be presupposed by teachings of two gelatin types only or mixtures thereof. Further, when considering new claims the same still reads on the existing prior art. While the comprising claim language is open and therefore inclusive, it does not foreclose the possibility of a soft gelatin capsule with Type A gelatin exclusively.

Further, the Examiner still acknowledges the Patent Office's burden to consider objective indicia of nonobviousness when it is present. A more close review of Table 1 on page 10 was undertaken to ascertain whether indeed there were unexpected results. As noted prior, review of the same did not reveal conclusive data to support the Applicants' claim of unexpected results, most especially in analyzing data with storage temperatures at 25 degrees and 30 degrees.